In The

United States Court of Appeals

For The Ninth Circuit

No. 18,252

The Superior Oil Company,

Petitioner,

v.

Federal Power Commission,

Respondent.

PETITION FOR REHEARING EN BANC

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FRANK H. SCHMID, Clerk

SORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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To The Honorable United States Court of Appeals For The Ninth Circuit and the Judges Thereof:

Comes now The Superior Oil Company (Superior), Petitioner in the above proceeding, and files this Petition for Rehearing *en banc* of the decision of this Court dated August 26, 1963. Such decision affirmed an order of the Federal Power Commission (Commission) summarily rejecting Superior's filing of an Application for a Certificate of Public Convenience and Necessity under Section 7 of the Natural Gas Act (Act), 15 U.S.C. Sec. 717-717w (717f), and a related Gas Rate Schedule under Section 4, 15 U.S.C. Sec. 717c. For support hereof Superior respectfully shows that this Court erred as to the facts reflected in this record and as to the law applicable to this case and its facts in the following respects:

I.

The Court erred in assuming that the Commission, under its general rule-making power, and without an evidentiary hearing, can do *anything* which it has substantive authority under the Act to do after such a hearing. Admittedly, the

only substantive authority of the Commission stems from Sections 4, 5 or 7 of the Act, each of which requires an evidentiary hearing. Thus the statute itself precludes reliance on its own rule making Section 16, which is limited to "necessary or appropriate" rules to carry out said Sections, and *also precludes* reliance on Section 4 of the Administrative Procedure Act, 5 U.S.C. Sec. 1003, which is applicable only "Except where notice or *hearing* is required by statute, . . .". (emphasis added)

II.

The Court erred in assuming that the substantive and rule-making authority of the Federal Power Commission under the Natural Gas Act relative to the summary rejection of certificate and rate filings is the same as that of the Federal Communications Commission under the Communications Act, 47 U.S.C. 301 et seq., notwithstanding the explicit provision of the later Act (Sec. 313 and 314) prohibiting monopoly and restraints on commerce, which have no counterpart in the Natural Gas Act.

III.

The Court erred in assuming that Superior's right to a hearing prior to the summary rejection of its filings was adequately protected by the waiver provision of the Commission's Regulations, Sec. 1.7(a) and (b), 18 C.F.R. 17(a) and (b), which waiver provision was added to the Commission's Regulations by its Order No. 255 on September 20, 1962 and published 27 F.R. 9499 on September 26, 1962. This waiver provision was *not* a part of the Commission's Regulations at any pertinent date. It was not added until 43 days *after* Superior's Application for Rehearing had been rejected by operation of law on August 8, 1962.

IV.

The Court erred in assuming that the orders here contested (Order No. 242 and the Order of summary rejection) are not "adjudicatory" of any existing right of Superior. The Court ignored the holdings in *United Gas Pipe Line*

Company v. *Mobile Gas Service Corp.* (1956) 350 U.S. 332, 76 S. Ct. 373 (Mobile) and *United Gas Pipe Line Company* v. *Memphis Light, Gas and Water Division* (1958) 358 U.S. 103, 79 S. Ct. 194 (Memphis) and *Willmut Gas & Oil Company* v. *FPC* (D.C. Cir. 1961) 294 F. 2d 245 (Willmut) that a natural gas company has the right to make its own contracts which right has not been abrogated by the Natural Gas Act, and the further right to set its own rates consistent with such contracts, subject only to the authority of the Commission to review such contracts and rates under Section 7 of the Act in the light of public convenience and necessity, as to initial rates, and under Section 4 under the standard of just and reasonable as to changed rates.

V.

The Court erred in extending the holding of the Supreme Court in *Atlantic Refining Company* v. *Public Service Commission* (1959) 360 U.S. 378, 79 S. Ct. 1246 (Catco) that the Commission must carefully scrutinize and react to the initial prices in a certificate proceeding to include power to remove by condition the provisions of a contract providing possible future price changes, and in failing to recognize that such careful scrutiny and responsible reaction can be given only after the evidentiary hearing required under Section 7 of the Act. The awesome consequence of this error is illustrated by the Commission's opinion issued September 11, 1963, Opinion No. 398-A (Mimeo p. 5), citing this Court's opinion as authority for the Commission's power to prohibit a rate increase above its "existing triggering rate pending conclusion of the area rate proceeding in AR 61-2, *even if such rate were indicated on the basis of individual company cost of service concepts.*" (emphasis added)

VI.

The Court erred in explicitly refusing to follow *Pan American Petroleum Corp.* v. *FPC* (10 Cir., 1963) 317 F. 2d 796 for the reasons stated in that decision.

VII.

The Court erred in holding that the Commission, under the Act, has substantive power to preclude a natural gas company from contracting for future rate changes in the light of *H. L. Hunt* v. *FPC* (5 Cir., 1962), 306 F. 2d 334 (Hunt), holding no such substantive power exists under said Act.

VIII.

The Court erred in assuming that administrative convenience is a sufficient basis to support the order of the Commission, contrary to the holdings in *Mississippi River Fuel Corp.* v. *FPC* (Mississippi) (3 Cir., 1953) 202 F. 2d 899, 902-903; *NLRB* v. *Trancoa Chemical Corp.* (1 Cir., 1962) 303 F. 2d 456, 461; and *La Buy* v. *Howes Leather Co.* (1957) 352 U.S. 249, 259, 77 S. Ct. 309.

IX.

The Court erred in assuming that the Commission's finding that favored nation clauses were contrary to the public interest in *Pure Oil Co.* 25 F.P.C. 383, was affirmed by the Court of Appeals in *Pure Oil Co.* v. *FPC* (7 Cir., 1961) 299 F. 2d 370, when that issue was not before the Court and the Commission was affirmed solely on the basis of its interpretation of the favored nation clause on the record there made. (p. 373).

X.

The Court erred in confusing the contractual authority of a Seller to file for a rate increase with the justness and reasonableness of such filed rate as to which supporting evidence need be offered only in a hearing called *after suspension of such filing.*

XI.

The Court erred in disregarding or misinterpreting the decisions of the Supreme Court and the Courts of Appeals in *Mobile, supra, Memphis, supra, Catco, supra, Mississippi, supra, Hunt, supra,* and *Willmut, supra.*

WHEREFORE, in view of the importance of the issues involved and the explicit and implicit conflicts with other decisions created by the instant holding of this Court, Superior prays that rehearing *en banc* be had and that this Petition be granted and that the above errors be corrected by vacating the Opinion of August 26, 1963 and the Commission's order under review and remanding the matter to the Commission with directions to accept Superior's tendered filings.

Respectfully submitted,

THE SUPERIOR OIL COMPANY

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CERTIFICATE OF COUNSEL

I, H. W. Varner, counsel for The Superior Oil Company, petitioner herein, hereby certify that the foregoing Petition for Rehearing in my judgment is well founded in law and further certify that same is not interposed herein for delay.

Service hereof has been made this day by mailing copies to all opposing counsel as provided in Rule 18 of the Court.

Certified at Houston, Texas this 18 day of September, 1963.

H. W. Varner

H. W. VARNER